

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY 28 1998

In the Matter of)

MARC SOBEL)

Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
of Certain Finder's Preferences)

MARC SOBEL AND MARC SOBEL)
d/b/a AIR WAVE COMMUNICATIONS)

Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT DOCKET No. 97-56

**MOTION FOR LEAVE TO FILE SUPPLEMENT
TO CONSOLIDATED BRIEF AND EXCEPTIONS**

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney, hereby respectfully moves for leave to supplement his pending *Consolidated Brief and Exceptions* in the captioned matter, in support whereof, the following is respectfully shown:

As the Commission is aware, the Presiding Judge's findings and conclusions regarding the alleged lack of candor turned in large part on the meaning and interpretation of two words in the January 1995 Sobel declarations, specifically, the words "interest" and "employee". *See, e.g., Consolidated Brief and Exceptions* at 19-20. In a recently released decision, the United States Court of Appeals for the District of Columbia Circuit addressed the issue of whether intent to deceive may be attributed on the basis of interpretation of words of potentially ambiguous meaning. At issue there was whether a broadcast licensee lacked candor with the Commission in describing its hiring practices in connection with an EEO review by stating that a background in

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classical music was a "requirement" for certain positions when, in fact, some positions were occasionally filled by individuals with no such background. The Court stated:

There remains the \$25,000 forfeiture for the station's lack of candor. The Commission insists that substantial evidence supports its finding. But the only evidence is two pleadings in which the Church's counsel described classical music training as a "requirement." The Commission relies on the AMERICAN HERITAGE DICTIONARY (New College Ed. 1976), which defines "requirement" as "[T]hat which is required; something needed" or "[S]omething obligatory; a prerequisite." *Id.* at 1105. But WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981 ed.) gives the word "requirement" more leeway, defining it: "something that is *wanted or needed*" or "something *called for or demanded*." *Id.* at 1929 (emphasis added.) We are not exalting one dictionary over another, but simply pointing out that the Commission has overstated the word's clarity. The Church's explanation for its use of the word "required" jibes with common understanding of the term. It is unremarkable to call a particular criterion a "requirement" even if you must sometimes bend it to fill a job opening. Particularly since the Church immediately clarified its position when questioned, it is an intolerable stretch to call its use of an ambiguous word an "intent to deceive." We are not surprised that the Commission could not point us to a single case where we have affirmed a finding of lack of candor on such slim facts. We vacate both the lack of candor determination and the \$25,000 forfeiture.

Lutheran Church-Missouri Synod v. FCC, No. 97-1116, slip. op. at 24 (D.C. Cir. Apr. 14, 1998).¹

This opinion, which was issued by the Court after the pleading cycle in connection with the appeal of the initial decision in this matter, has a strong bearing on the matter under review because of its instruction regarding the finding of the requisite element of intent to deceive based on *post hoc* speculation regarding the meaning of words of ambiguous meaning.² Sobel therefore respectfully asks for leave to submit to the Commission a supplemental brief addressing the applicability and import of this decision on the matter under review.

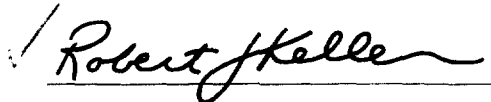
¹ A WordPerfect version of the opinion is available on the Commission's web site at: <http://www.fcc.gov/ogc/documents/lutheran.wp>.

² Moreover, this was a case in which the Commission had merely imposed a \$25,000 forfeiture for the alleged lack of candor. In this case the penalty recommended by the Presiding Judge is total disqualification and the revocation of all of Sobel's licenses. In addition to raising the question of inconsistent treatment, this also suggests that an even stronger showing of intent to deceive ought be required in this case in light of the severity of the sanction to be imposed.

WHEREFORE, it is respectfully requested that Sobel be granted leave to submit a supplement of no more than ten pages in length, and to be limited to the applicability of the above-referenced Court of Appeals opinion, within ten days of an order by the Commission granting this motion.

Respectfully submitted this 28th day of May, 1998,

MARC D. SOBEL d/b/a AIR WAVE COMMUNICATIONS

A handwritten signature in cursive script, reading "Robert J. Keller", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 28th day of May, 1998, I caused copies of the foregoing *MOTION FOR LEAVE TO FILE SUPPLEMENT TO CONSOLIDATED BRIEF AND EXCEPTIONS* to be hand delivered, except as otherwise indicated below, to the officials and parties in WT Docket No. 97-56, as follows:

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